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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. 895

DAVID DORAN,

Petitioner,

vs.

UNITED STATES OF AMERICA.

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, David Doran, respectfully prays that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Seventh Circuit entered on January 11, 1962.

JUDGMENT AND OPINION OF COURT BELOW.

The Judgment of the District Court for the Northern District of Illinois was entered on April 1, 1960, sentencing the defendant to imprisonment for 25 years. The case is not yet reported, but appears at p. 175 of the Appendix certified to this Court by the Clerk of the Court of Appeals.

The Opinion of the Court of Appeals for the Seventh Circuit affirming said judgment was filed January 11, 1962. It appears in the Appendix hereto and in the certified copy of the Record. The Opinion is not yet reported. Petition for rehearing was denied on March 7, 1962.

JURISDICTION.

The jurisdiction of this Court is invoked under 28 U. S. Code 1254(1).

QUESTIONS PRESENTED FOR REVIEW.

1. May a defendant be sentenced to fifteen years for conspiracy when he was not indicted for such offense; when the trial judge gave not one instruction to the jury on conspiracy; and when, by the government's theory, adopted by the trial court, the same so-called conspiracy is charged in three separate counts for which the defendant received three 5 year consecutive sentences?

2. May the Court of Appeals ignore this Court's holdings in the recent cases of *Elkins* v. *United States*, 364 U.S. 206 and *Rios* v. *United States*, 364 U.S. 253, where evidence was introduced in the trial which was illegally seized by a state officer and where the trial court adopted the theory and argument of the government prosecutor that even if there were an illegal search by state officers it did not affect the legality of the presentation of the evidence on behalf of the federal government in a federal prosecution?

3. May a judgment of conviction and a sentence of 25 years imprisonment stand where the Court of Appeals in its Opinion stated that there was " . ... no showing that it (the evidence) was not seized in a search incidental to a lawful arrest", where it was admitted during the federal trial that in a state proceeding the evidence in question was suppressed on the grounds of an illegal search by state officers and where in the federal trial the prosecutor had assumed that irrespective of the illegality of the state search that the overturned "silver platter" doctrine still applied?

4. Can a defendant receive a fair trial in accordance with the standards of criminal justice as laid down by this Court when many of the exhibits were improperly numbered, when some of the exhibits were changed after the introduction of them into evidence so that they might conform to certain counts, and when there were duplicate numbering of exhibits without identification to which particular counts the exhibits applied?

5. May a conviction be sustained when there is a failure by the trial court to instruct the jury on essential elements of the case in connection with the counts charging interstate transportation of checks; and does not the trial court's failure to do so deprive the defendant of a fair trial in accordance with the standards of criminal procedure in a federal case?

6. Where the Court of Appeals has misapprehended the contentions of the defendant and the state of the record on the questions presented, and where the Court of Appeals has failed to rule on some of the questions presented in the brief filed there by the petitioner, should not this Court exercise its jurisdiction to prevent an injustice where

the defendant was effectively denied his right to have an appellate court consider the legal points he raised for consideration?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

1. Fourteenth Amendment to the Constitution of the United States.

2. Section 1341, Title 18, United States Code.

3. Section 2314, Title 18, United States Code.

The pertinent provisions appear in Appendix D hereto.

STATEMENT OF THE CASE.

David Doran and others were convicted after a trial to a jury. He was indicted with other defendants, Dominick Abbrescia, Joseph Grieco, Aleck Harris, Nate Schulman, Amedeo DiDomenico, Joseph A. LoCelso, and James T. Korbos in a 40 count indictment charging in the first 6 counts the use of the mails in pursuance of a scheme to defraud in violation of Section 1341, Title 18, United States Code and in counts 7 through 40 the transporting in interstate commerce of either falsely altered or forged checks in violation of Section 2341, Title 18, United States Code.

Doran was convicted in Counts 1, 2 and 6 of the mail fraud counts and on 16 of the interstate transportation counts.

He was sentenced to five years each on Counts 1, 2 and 6, the sentences to run concurrent; and ten years on each of the remaining 16 counts of the indictment, the sentences to run concurrent with each other, but consecutive to the sentence imposed on Counts 1, 2 and 6, making a total of 25 years altogether (A. 175).

(Abbrescia was sentenced to 10 years; Grieco to 15 years; LoCelso to two years; DiDomenico, two years; Harris, two years; and Schulman, one year. Grieco, Abbrescia and LoCelso have filed their separate appeals and petitions).

The errors relied on relate to the erroneous conviction and sentence of the defendant to 15 years on conspiracy, with which crime he was not charged in the indictment, on which charge no instruction was given, and which charge,

by the government's theory, was set out in three separate Counts 1, 2 and 6, all charging the same offense; to the refusal of the court to suppress certain evidence seized by a state officer in an illegal search on the theory of the overruled "silver platter" doctrine; to the court's failure to instruct upon the essential elements of all counts relating to the transportation of altered and forged checks; to the failure to charge the jury properly of the theory of individual liability as to those counts charging transportation of altered or forged checks.

Further, the defendant complains of not receiving a fair trial by virtue of the confusion which existed with respect to a wide variety of Exhibits which were renumbered, identified but not offered, offered but not identified, etc., even to the renumbering of Exhibits after the case was on appeal in the Appellate Court.

The Scheme.

The first 6 counts of the indictment charged generally a scheme to defraud and the use of the mails pursuant to such scheme by placing or causing to be placed in an authorized depository envelopes addressed to certain banks in Potomoc, Illinois (Count 1) in Midland, Michigan (Count 2), and in Villisca, Iowa (Count 6). Generally speaking, the scheme consisted of the operation of a tavern and cocktail lounge on West Madison Street in Chicago, known as the "Show Lounge". There was proof that Abbrescia as owner and Doran as manager would ply customers with drinks, cause their intoxication or take advantage of their intoxication, if they arrived already in that state, and cause the customers to sign certain checks. The defendants made it appear that the checks were torn up and that other checks were substituted therefor. Checks

were raised in the amounts of $100 or $200 from checks of $10, $15, $20 or $25; and some checks were alleged to have been forged. Some of the customers were brought to the tavern by cab-drivers DiDomenico, LoCelso and Korbos. It was alleged that checks would then be deposited with the defendant Harris through the Lawndale Restaurant, and then to his bank, the Merchants National Bank; with defendant Schulman through his Ogden-Kedzie Currency Exchange, and then to the Exchange National Bank; and with defendant Grieco, through his 24 Hour Shopping Center and then through his bank, the Merchants National Bank.

Such generally was the mail fraud scheme charged in Counts 1, 2 and 6.

As to the remaining counts, it was charged that the defendant transported in interstate commerce a falsely altered or forged security, to wit, a check.

REASONS FOR GRANTING THE WRIT.

I.

In its opinion the Court of Appeals states that petitioner Doran was found guilty of conspiring to use the mails in a scheme to defraud. (Appendix A1). That the Court of Appeals intended to be understood as regarding Counts 1, 2 and 6 of the indictment as counts charging conspiracy is further evidenced by the closing paragraph of the opinion in which those counts are again referred to as conspiracy counts as distinguished by the Court of Appeals from "substantive count 39." (Appendix A7). Doran was sentenced to consecutive five year terms on Counts 1, 2 and 6, for a total of 15 years on those counts alone. (He was sentenced to ten years on the remaining counts, but consecutive to the sentences on Counts 1, 2 and 6, making a total of 25 years in all.)

Now either Counts 1, 2 and 6 were conspiracy counts, or they were not. Examination of those counts as set out in the indictment discloses that no conspiracy was charged there. Doran was charged, by the indictment, with the commission of substantive uses of the mails in furtherance of a scheme to defraud. (See Appendix, pp. 11 to 21 and pp. 23 to 39). Nevertheless, the Court of Appeals has affirmed a supposed conviction of conspiracy as to those counts.

If we assume that the mail fraud counts in question in fact charged a conspiracy, we would invite this court's attention to the fact that no conspiracy charge was given to the jury. Furthermore, if appellant Doran is considered to have been convicted of conspiracy, as held by the Court of Appeals, then he has been given consecutive sen-

tences for the same solitary offense, for the reason that Counts 2 and 6 adopt the allegations of Count 1, setting out the same identical conspiracy whose object was to defraud the same identical individuals, naming the same identical alleged defendants, "co-conspirators".

Thus, if Doran was charged with a conspiracy, the same conspiracy was alleged in all three counts. Yet Doran has been sentenced to consecutive sentences for those identical offenses.

If Doran was convicted of conspiracy, as claimed by the Court of Appeals, he was convicted of conspiracy without any instruction whatever by the trial judge appropriate to a jury charge under a conspiracy indictment. Thus, the Court of Appeals holds, that one may be convicted of conspiracy without being indicted for conspiracy, without instructions being given to the jury as to what it must find to return a guilty verdict of conspiracy, and finally, that a defendant can be given consecutive sentences in the penitentiary for the same conspiracy, provided only the prosecutor says it three times in his indictment.

If, on the other hand, the Court of Appeals was merely mistaken as to what petitioner Doran was charged with, then we would suggest to Your Honors that Doran has not been granted review of his conviction. For he was not indicted for conspiracy. Yet the Court of Appeals apparently thought it was reviewing a conspiracy case. We urge that the Court of Appeals' gross error in this regard derived directly from an identical error committed throughout the course of the trial. The trial judge announced from time to time that petitioner Doran was charged with conspiracy in the mail fraud counts. Appendix, 65, 81, 82, 95, 97, 99, 104, 145, 160.

The trial judge's error was induced either by his failure to read the indictment or to read it correctly. We would suggest to that court that it is error of the most grievous variety for a trial judge to announce repeatedly in the presence of the jury that a defendant is on trial for an offense not set forth in the indictment. Nothing could more confound the defense of a criminal case than to appear for trial on the assumption that the charge in the indictment is the one to be faced, only to learn that a charge not set forth in the indictment is the charge actually being tried.

We think it no answer in this case to suggest that what the trial judge had in mind was that the petitioner was being tried on a "conspiratorial object" theory of vicarious criminal liability. For in this case, no instruction was given as to any theory of vicarious liability—neither an aiding and abetting instruction (see *Nye & Nissen* v. *United States*, 336 U.S. 613, 618) nor a conspiratorial object instruction (see *Pinkerton* v. *United States*, 328 U.S. 640, 645-647). Thus by the court's constant comment throughout the trial that petitioner Doran was on trial for conspiracy, the jury was not given to understand that the evidence was merely to be considered in the light of activities common to Doran and his codefendants. Rather the jury was clearly given to understand that Doran was in fact charged with conspiracy, a situation which was wholly and completely untrue.

We would further suggest to Your Honors that if the trial judge, and the Court of Appeals were both in a state of error as to the offenses charged in the indictment, then it is highly likely that the lay jury were even more confused as to the nature of the offense for which petitioner Doran was being tried.

II.

The Court of Appeals has so far sanctioned a departure from the procedure and standards appropriate for criminal trials in the federal courts as to call for an exercise of this court's supervision.

The Court of Appeals failed to hold that the recent cases of *Elkins v. United States*, 364 U.S. 206 and *Rios v. United States*, 364 U.S. 253 had any application to the facts here. The record shows that petitioner's co-defendant Doran was arrested by a state officer, placed under arrest and an illegal search ensued thereupon turning up a number of exhibits (A. 99). Certain exhibits were admitted into evidence over objections (A. 153).

Chicago police officer Tracy testified he made a vice investigation on the 2nd floor at a bar on Lake Street and after a conversation with two girls, paid them $25.00. He placed them and defendant Doran under arrest (A. 99). He searched the premises and found Exhibits 64, 164, 264, 364, 564, 47, 247, 347, 447, 547 and 747 (A. 99). Of these Exhibits 47, 247, 447, 64 and 264 were admitted into evidence over objections (A. 153).

Defendants moved for a mistrial on the ground that the witness testified to other crimes (A. 99). It was brought out by the witness that in the State proceedings which followed the arrest of Doran, he and the girls who were arrested were discharged following the suppression of evidence on the ground of illegal entry (A. 99). Whereupon the defendants again moved for a mistrial and called to the court's attention that there was a judicial ruling that the search and seizure by Tracy were illegal (A. 100). To which objection the prosecutor stated the government's position:

> "If there was an illegal search, your Honor, it does not affect the evidence which is presented here, which

is presented on behalf of the Federal government. Therefore, his motion does not apply to this evidence." (A. 100).

The trial court agreed with the government's attorney. Both were in error. *Elkins* v. *United States*, 364 U.S. 206, 4 L. ed. 2d 1669, 80 S. Ct. 1437, and *Rios* v. *United States*, 364 U.S. 253, 4 L. ed. 2d 1688, 80 S. Ct. 1431. (Both cases decided June 27, 1960).

Elkins overruled the so-called "Silver Platter" doctrine upon which the government here relied. This Court held that evidence obtained by State officers during a search which, if conducted by federal officers, would have violated a defendant's immunity from unreasonable searches and seizures is inadmissible over the defendant's objection in a federal criminal trial. In *Rios*, this Court held that the evidence seized in an unreasonable search by State officers is to be excluded from a federal criminal trial upon the objection of the defendant, and that the District Court should consider whether the State officer obtained the evidence during a search which, if conducted by federal officers, would have violated the defendant's immunity from unreasonable searches and seizures under the Fourth Amendment. In the instant case, the trial court took no such action, even though it was pointed out that a State court had made a ruling determining that the arrest and search by officer Tracy was illegal and that in the State hearing the evidence was in fact, suppressed (A. 99-100).

Under *Elkins*, where there was a violation of Federal constitutional rights by the State officers in obtaining the evidence, as here, the trial court should not have permitted Tracy's testimony, nor have permitted evidence about the exhibits nor have permitted their introduction. Under *Rios*, the court should have held a hearing outside the presence of the jury to determine whether Tracy's conduct, if en-

gaged in by federal officers, would have amounted to a violation of the defendant's constitutional rights. The court did neither. Accordingly, it was error.

Notwithstanding the clear showing made in the record that the defendants objected to the introduction into evidence because of the illegal state search and notwithstanding that the trial court followed the government's contention that it made no difference whether there was an illegal search because the "silver platter" doctrine applied (A. 100), the Court of Appeals chose not to comment on the applicability of the two cases cited. The Appeals Court opined, "There was evidence seized in the brothel, and no showing that it was not seized in a search incidental to a lawful arrest. We show no error in its admission." (See Appendix A, p. 8)

It is clear from the record made in the trial court that the government was satisfied that even if there was an illegal search by state officers such evidence could be introduced in the federal case (A. 100). The trial court followed this argument of the government prosecutor and, therefore, ruled that the evidence was admissible under the old "silver platter" doctrine. Now that the *Elkins* and *Rios* cases forbid the introduction in a federal case of evidence which was admittedly obtained illegally by state officers, the Court of Appeals decided to rule against the petitioner's contention on the ground that there was no showing that the evidence was not seized in a search incidental to a lawful arrest. But the government witness, state officer Tracy, testified that in the state court proceedings the defendants were discharged following the suppression of evidence on the ground of illegal entry (A. 99).

Defendant even moved for a mistrial (A. 99), which motion was denied.

It is plain that the Court of Appeals has misapprehended the necessity for the application of this court's rulings in *Elkins* and *Rios;* and under the circumstances this Court should grant the writ.

III.

The Court of Appeals denied the defendant his right to a review of the legal points raised before it. The Opinion of the court below entirely ignores the complaint that the prosecution confused the Record on the trial and further distorted it on review to the prejudice of the defendant's right to a fair trial.

The Brief to the Court of Appeals of co-defendant Grieco on this point was adopted by the instant defendant. An entire argument was made to the Appeals Court that the Record in the trial was so confused with respect to the numbering of exhibits and that the record was even distorted on review that no defendant could have had a fair trial. Yet, the Appeals Court evaded speaking on this claimed error at all. That the error is important as prejudicial to the defendant is demonstrated as follows:

> ". . . the record is not meaningful in the absence of complete clarification as to the exhibits." (Government affidavit filed in the Appellate Court in this case).

This case is a document case. All the testimony related to documents and was adduced to explain them.

Lest your Honors become confused by the 150-odd documentary exhibits admitted and by the several hundred identified, we would offer that clarification so avidly sought by the prosecution in this case.

An exhibit numbered 36 caused some problems that needed solving according to the government (A. 97) because count 36 (A. 37) charged on an instrument dated four months *after* the indictment was returned, and Exhibit 36 was dated two years *before* its return. When the defense claimed a variance the prosecutor "solved the problem", as he put it, by calling Exhibit 236 Exhibit 36 while Exhibit 36, previously Exhibit 229 was called Exhibit 236 (A. 97).

Exhibit 61 was identified as a bank signature card (A. 46) and the needed clarification is provided by pointing out that in fact it is a check.

Exhibit 1002 and Exhibit 1202 likewise create no problems, owing to the fact that they are both the same exhibit, sailing under two flags (A. 49).

Exhibit 1501B was not identified by any witness, so it was merely offered and received into evidence (A. 153, 157), while Exhibit 1501A, while not offered, enjoyed the distinction of being identified (A. 69).

Exhibits 961A and 961B were identified. Exhibit 961A was offered and received and went to the jury (A. 153, 160) and 961B went to the jury without bothering to get itself offered or received.

Exhibit 176 was offered and received into evidence (A. 161), but was not among the exhibits filed here after this case was docketed. So the government returned to the trial court to change the record in order that where "176" appeared in the record "167" should appear instead (A. 181). In a motion filed in the Appellate Court, the government said it had procured the change so the record would conform to the actual District Court proceedings. The judge said when he made the change that

the court reporter had not made a mistake in taking down the numbers during the trial (A. 183).

When the government returned to the trial court, to make the record un-conform to what the admittedly accurate court reporter's transcript said happened at the trial, it moved that reference to Exhibit 334 be stricken from the record (A. 180) having previously stated to the Appellate Court by motion that its records showed that if the exhibit existed, it was an advice of a check refund, was never identified, and was offered into evidence by mistake. Once back in the trial court, the government fortunately "found" the check refund exhibit (A. 182) which had been offered by mistake and was never in the record anyway and didn't exist and besides is a roll of microfilm filed in the Appellate Court.

The prosecutor found something wrong in the numbering of Exhibits 133 and 133a. So he changed them to 330 and 530 respectively to "apply to" Count 30 as the prosecutor put it. If they applied, they applied to count 29. Witness Lawler said he did not sign count Exhibit 29 but it cleared his bank (A. 89). Witness Myhre complained that Exhibit 29 didn't bear his signature either and it cleared *his bank* too (A. 60). Exhibits 133 and 133a have Lawler's name on them. That is, some of them do. On the other hand, Exhibits 133 and 133a have Mark Little's name on them, and not Lawler's. That is why the prosecutor made the change he did not make to 330 and 530 "to apply to Count 30". They have so little to do with Count 30. Like the jury, the Appellate Court had before it, two exhibits marked 133 and two exhibits marked 133a. Also Exhibit 29, possibly the only universally denounced forgery that your Honors will ever see that was honored by two banks, fifteen hundred miles apart, within a period of a week, over the protests of two depositors with com-

pletely dissimilar names. Government did not want the Appellate Court to be confused, just as it did not want the jury to remain confused after its verdict. So the government returned to the trial court *after the case was docketed* in the Appellate Court and persuaded the trial judge to change Exhibit 133a to 133-a-1.

We trust that the Court is now attuned to that "complete clarification as to Exhibits" deemed requisite by the government for the record to be "meaningful". For our own part, the more it is explained, the more we don't understand.

• • •

Our complaint is not academic.

Exhibit numbers were changed after witnesses had identified them, and before still others had discussed them,—all by number. No juror could possibly understand clearly that today's witness was discussing a totally different document from that described by yesterday's witness.

That the error was harmful is further evidenced by the conviction under Count 33. No interstate transportation was proved, yet Exhibit 133a, unrelated to Count 33, suggests interstate transportation of a check. Under the numbering "system" employed (last two digits identify the related Count) the jury was sure to believe that 133a supplied the missing element of proof.

In short, it became impossible for the jury to know what had been proved, and what had not. If the prosecutor, for example, could convince the trial judge that he had proven that first endorsements on dozens of checks were fictitious (A. 159) when in fact he had not introduced evidence of one such endorsement, it follows that the less experienced jury was similarly susceptible.

The confusion generated by the exhibit-juggling still infects the record. It necessitated a recent application to the trial court for changes in the transcript—not to correct the record, but to improve on it. (A. 183). A trial procedure whose proponent is unwilling to expose it to review without alteration, is unjustifiable. And the right to review necessarily entails the right to bring before the reviewing tribunal an accurate account of the proceedings below.

There is a dearth of decisions on this point occasioned probably by the rarity of its occurrence. However, either this Court should grant certiorari and rule on this question or should send the case back to the Court of Appeals with instructions to render its opinion on this point.

IV.

The Appeals Court denied the defendant his right to review by failing to render its opinion on the defendant's claimed error that the trial court failed to instruct the jury as to the essential elements of the crime charged in Counts 8 through 40. The defendant was found guilty on sixteen of those counts. In the first six counts the petitioner was charged with using the mails in pursuance of a scheme to defraud in violation of Section 1314, title 18, U. S. Code (A. 11-21). In the remaining counts (A. 22-39) in which he was found guilty, the petitioner was charged with the interstate transportation of falsely altered or forged securities in violation of Section 2314 of Title 18.

Neither of these statutes is complete in itself. The court undertook to instruct the jury at length as to the essential elements of the mail fraud statute relating to Counts 1, 2 and 6 (A. 167-169).

But there were no such comparable instructions given on the remaining 29 counts. Section 2314 denounces the interstate transportation of "any falsely made, forged, altered or counterfeited securities". Obviously, resort must be had to other statutes if one is to determine what is meant by "falsely made", "forged", "altered", "counterfeited", or for that matter, "security".

The court apparently recognized an area of legitimate concern lest the jury should not realize that a check is a security. The jury were, accordingly, instructed that the term "security" included checks (A. 172).

But how was the jury to know what was meant by false making forgery or false alteration?

The Court had an affirmative obligation to inform the jury concerning the elements comprising the offense whereof defendants stood charged. This obligation is absolute, and cannot be excused by reason of any defense failure to request a charge or to object to the charge as given. *United States* v. *Levy*, 3 Cir. 153 F. 2d 995, 999; *Morris* v. *United States*, 9 Cir. 156 F. 2d 525, 527; *Screws* v. *United States*, 325 U.S. 91, 107. As observed in *Morris*, *supra*:

> "In a criminal case, it is always the duty of the court to instruct on all essential questions of law, whether requested or not (p. 527) . . . The charge to the jury should not leave the jurors in ignorance of or leave them to their conjecture as to what constitutes the offense charged." (p. 529).

And in *Levy*, the court termed it:

> ". . . error of the highest degree to submit the case to the jury without adequate instructions as to the law allegedly violated by the defendant on trial." (p. 999).

But in considering the interstate transportation counts, the jury here were left to determine for themselves all of the following qustions:

(a) What is a falsely made security?
(b) What is a forgery?
(c) What is an "altered security?"

The court's failure to define these terms for the jury, was fatal error within the evidentiary context of this case.

One reason why the error was so highly prejudicial in this case, is that the government sought to prove that every count check was "falsely made" as a layman might use that term, through evidence which does not establish that the checks were "falsely made" in the statutory sense.

For the count checks were "made" by the victims, according to the government's theory, because the victims were "falsely" informed that the checks were intended as substitutes for others which had been torn up. A juror would have been justified in believing, under the court's instruction, that such a check was "falsely made." A juror might well also have believed that merely inducing a man to make a check while intoxicated, necessarily stamped the result a "falsely made" check.

But that is simply not what the statute means. A "falsely made" check is *not* one which has been obtained by false representations, or by overreaching the maker. A document is "falsely made", within the meaning of this Section, only if the document is actually something other than what it purports on its face to be—in short, "falsely made" is virtually synonymous with "forged." *Martenet v. United States*, 10 Cir. 1954, 216 F. 2d 760, 763.

Of course, the statute also denounces the interstate transportation of checks obtained by the type of fraud that the government attempted to prove. But the transportation of such *fraudulently obtained* checks is criminal under this section only if the value thereof exceeds $5,000.00. Sec. 2314, Title 18, U.S.C. The $5,000.00 valuation is, in those circumstances, essential and jurisdictional. *Stern* v. *United States*, 6 Cir., 204 F. 2d 647, 649; *Abbott* v. *United States*, 5 Cir., 239 F. 2d 310, 312. *United States* v. *Gordon*, 7 Cir., 253 F. 2d 177, 180; *United States* v. *Pearce*, 7 Cir., 275 F. 2d 318, 324. The jury was not instructed on any such theory, and the indictment did not charge that offense. In fact, the total of *all* of the proved count checks is less than $5,000.00.

The simple fact is that a fraudulently obtained check is not a "falsely made" check within the meaning of this Statute. It was therefore indispensible that the jury be told that the government's principal contention as to "falsity" was not "falsity" within the meaning of the Statute, however illogical that proposition might seem to a lay juror.

To illustrate the hardship imposed by this situation, we direct your Honors' attention to the government's theory that the first endorsements on the reverse of the checks were that of fictitious persons (A. 15, 159). While there was no evidence on the point, if in fact the jury believed the government's assertions, how were they to know that a fictitious endorsement does not taint a check as a forgery?

Further, how was the jury to know that a check signed by someone other than the intended maker, but with the authorization of the intended maker, was not a forgery? There was direct evidence of such a situation in the case of the witness Bynum, affective of Counts 39 and 40 (A. 85). All the other counts involving forgeries ought prop-

erly to have required as a prerequisite of guilt, a determination by the jury that the signatures were not authorized by the purported maker; and this cannot have been a routine inquiry in view of the intoxicated condition of the witnesses involved. But the jury was instead left free to speculate that any instrument which does not bear the genuine signature of the purported maker, is necessarily a forgery. This cannot but have simplified their deliberations—as, indeed, must be the case wherever the jury is left free to determine guilt without reference to the underlying legal principles.

As to so-called altered securities, the jury was not apprised that the alteration must be unauthorized; that it must be material; and that it must appear upon the face of the instrument itself. The jury also could not possibly have understood that the appearance of a fictitious first endorsement on an instrument payable to "cash" is neither a forgery nor an alteration so far as this case was concerned.

There is no question that the requirement of instructing the jury as to the elements of the offense, may be satisfied by a reading of the statute if that statute is itself sufficiently clear that no explanation is required. But if the statute be such as to require legal determination as to the meaning of the words therein used, a reading of the statute will not suffice. *United States v. Gordon*, 3 Cir., 242 F. 2d 122, 126, said that if an instruction failed to define the offense charged the case must be reversed.

And Section 2314, Title 18 does not define the primary offenses, such as "false making", or "forgery," to which it refers. *Rowley* v. *United States*, 8 Cir., 191 F. 2d 949, 950. It necessarily follows that a mere reading of the statute cannot possibly inform the jury of the elements of the offense.

The State of Illinois defines a forgery in a paragraph of some 500 words. Illinois Revised Statutes, 1959, Chapter 38, Section 277. Notwithstanding this, the cases are legion wherein the Illinois courts have been called upon to determine what is, and is not a forgery under that statute. To claim that the jury could determine, on the facts and circumstances of this case, whether any count document was a forged or altered security, is sheer sophistry.

Clearly, as to the interstate transportation counts, there was a total failure to advise the jury of the essential elements of the offense charged. It is settled law that conviction on those counts must, therefore, be reversed.

As it was said in *Screws v. United States*, 325 U.S. 91, 107 the failure to instruct on essential elements is error,

> ". . . so fundamental as not to submit to the jury the essential ingredients of the only offense on which the conviction could rest . . ."

And this is an error which is all the more calamitous in view of the large number of purely State offenses alluded to by the prosecution. Such error called for the Appellate Court's reversal—or at least consideration of discussion.

As to this claimed error the Appeals Court failed at all to render its opinion; and, therefore, the defendant was effectively denied his right to have his case reviewed.

CONCLUSION.

For all of the foregoing reasons this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

JULIUS LUCIUS ECHELES,
Attorney for Petitioner

APPENDIX A.

In the

United States Court of Appeals

For the Seventh Circuit

No. 13094 SEPTEMBER TERM, 1961 JANUARY SESSION, 1962

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
DAVID DORAN, DOMINICK ABBRESCIA, JULIUS GRIECO, and JOSEPH A. LoCELSO,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

January 11, 1962

Before SCHNACKENBERG, KNOCH and KILEY, *Circuit Judges.*

KILEY, *Circuit Judge.* The defendants Abbrescia, Doran, and Grieco have appealed from judgments on verdicts finding them guilty of conspiracy to use the mails in a scheme to defraud[1] and of unlawfully causing the trans-

[1] 18 U.S.C. §1341 Frauds and swindles. Whoever, having devised or intending to devise any scheme * * * to defraud, or for obtaining money * * * by means of false or fraudulent pretenses, representations, * * * or procure for unlawful use any counterfeit or spurious * * * security * * *, for the purpose of executing such scheme * * * or attempting so to do, places in any * * * authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department * * * or knowingly causes to be delivered by mail according to the direction thereon * * * any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

portation in interstate commerce of forged or falsely-altered securities.[2] LoCelso appeals from the judgment on the verdict finding him guilty of the conspiracy. Abbrescia was sentenced to prison for ten years, Doran for twenty-five years, Grieco for fifteen years, and LoCelso for two years.

There is ample proof of the unlawful scheme in detail. Cab drivers would seek out nightlife-bound visitors in Chicago and drive them to the Show Lounge. There they would be drawn into the net of an unlawful scheme by companionable female employees of the Lounge. The unlawful aim of these companions was to exhaust the cash reserves of the victims and aid in inducing, as quickly as possible, drunkenness by means of frequent or spiked drinks. Once out of cash, the victims were induced to sign checks already "made." Once written, the checks were used as models for tracing forged copies. The copies were then used in various ruses to induce the writing of additional or substitute checks. First endorsements were generally fictitious to give the appearance of genuineness and to conceal the culprits. The checks were negotiated to persons like Grieco, and institutions like the 24-hour Shopping Center, having bank accounts. The checks were deposited in the accounts and thus placed in channels which led to the mails and eventually to the drawee banks in Illinois and other states.

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[2] 18 U.S.C. §2314. Transportation of stolen goods, securities, monies, or articles used in counterfeiting.

* * *

Whoever with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altered or counterfeited securities, knowing the same to have been falsely made, forged, altered, or counterfeited; * * *

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

Lo Celso was a cab driver; Grieco owner of the 24-hour Shopping Center, whose bank account and his own were at the Merchants National Bank in Chicago; Abbrescia was manager of the Lounge and Doran his assistant.[3] They were convicted under the conspiracy Counts One, Two, and Six. None of them testified at the trial.

Abbrescia and Grieco were sentenced to five years, and Lo Celso to two years, on each count, the sentences to run concurrently. Doran was sentenced to five years on each count, the sentences to be served consecutively.

The defendants claim that the evidence does not support the jury's verdicts as to these counts.

The first question is, therefore, whether there is substantial evidence, taking the view most favorable to the Government, to support the verdicts. *Glasser* v. *United States*, 315 U.S. 60, 80 (1941); *United States* v. *Marcy*, 7 Cir., 248 F. 2d 663, 665, cert. denied, 355 U.S. 931 (1957).

The evidence and inferences favorable to the Government, *United States* v. *Green*, 7 Cir., 246 F. 2d 155, 157, cert. denied, 355 U.S. 871 (1957), in proof of defendants' participation in the conspiracy are: Lo Celso was one of the cab drivers who brought victims to the Show Lounge. He shared in the division of a percentage of the proceeds of the unlawful conspiracy. He would "halt drag and half stagger" the victims to a cab for return to their hotel or "some place." He drove victim McDonald to the Show Lounge, presented him to Abbrescia, and McDonald was defrauded. He also drove victim Siehl to the Lounge and later to a brothel. He received a "gratuity"

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[3] Defendants Hayes and Schuman later not appealed. Di Domenico died pending trial, and Kortas was dismissed before trial.

from Siehl of a $350 check which he deposited with a cab company credit union and later withdrew.

Also: Grieco owned the 24-hour Shopping Center and the Show Lounge. The first fraudulent check taken was of victim Bardin, dated September 21, 1956, drawn on a North Carolina bank. It was endorsed by Shopping Center and deposited in its account with Merchants National Bank of Chicago, where Grieco also had his personal account No. 20284. The check was not paid by the drawee and was returned "Payment Refused Amount Altered." Merchants National debited Shopping Center's account accordingly and notified it of the dishonor of the Bardin check.

And: Subsequently, victim Wyman's check, dated December 4, 1956, subject of Count One, was taken. It was "made" in printing similar to Doran's and drawn against the Goodwine State Bank of Potomac, Illinois. It bears the endorsements "Jack Johnson: Shopping Center: J. Grieco, 2946 W. Madison: Merchants." Grieco wrote his endorsement. The check was received by the Goodwine Bank and returned dishonored. It had not been put through a "bad check" detecting device that Shopping Center had had installed which photographs checks and presenters of checks. The device was installed under a contract indemnifying Shopping Center against loss from "bad checks." The contract required all Shopping Center's checks to be processed.

The jury could reasonably conclude from the evidence and inferences in the record that Abbroscia and Lot also were members of the unlawful scheme of which Wyman was a victim; and that Doran "made" the fraudulent Wyman check and that the first endorser was fictitious.

Once shown to be a part of the conspiracy, Grieco is responsible "for all that may be or has been done." *Polatico v. United States*, 6 Cir., 237 F. 2d 97, 104, cert. denied, 352 U.S. 1025 (1956). His participation need not have been shown by direct evidence. *Ibid.* Since a check drawn on a New Jersey bank was returned dishonored in eighteen days, the jury could reasonably infer that the Bardin check was returned from the North Carolina bank, and Shopping Center notified, within the eighty one days before the Wyman check was written. And it could conclude that Grieco, as owner of the Shopping Center, knew of notice of the returned Bardin check and with that guilty knowledge endorsed the Wyman check.

Venue was proved with respect to the Wyman check. It was made in Chicago, deposited in a conspirator's account in Chicago, mailed in Chicago and returned in the mail to Chicago. There was proof of defendants' mailing the check. Evidence of the ordinary course of banking business and Post Office Department customs was substantial proof of the mailing. *Decker v. United States*, 4 Cir., 146 F. 2d 378, 379, cert. denied, 324 U.S. 792 (1944); and Grieco's business experience and consequent knowledge of ordinary banking practice was enough to show he caused the mailing. *United States v. Sheridan*, 329 U.S. 379, 391 (1946).

The verdict was justified on Count One. Because their sentences on Counts One, Two and Six are concurrent and the verdict against Abbruscia, Grieco and Lotorso is justified on Count One, we need not consider the other two counts against them. *Lawn v. United States*, 355 U.S. 339, 359 (1958); *Bovarie v. United States*, 353 U.S. 53, 59 n. 6 (1956); *United States v. Sheridan*, 329 U.S. 379, 381 (1946).

Count Two involved a check of H. L. Smith. There was comparative evidence from which the jury could find that Doran, who wrote the victim Bynum's check (subject of Count Thirty-nine), also wrote the Smith check. Count Six involved a copy of a collection form representing a check of victim Garland, drawn by the "manager" of the Lounge. There was evidence that the check involved in this count was presented by Doran to a currency exchange for collection, that at the time he represented that it was from the Lounge, and expected the concealment of this fact. We conclude that the evidence and inferences support the verdicts against Doran on Counts Two and Six as well as on Count One.

Abbrescia, Doran and Grieco were each convicted on substantive Counts Thirty-nine and Forty. Grieco was sentenced to ten years' imprisonment, Abbrescia to five years, and Doran to ten years, on each count, the sentences to run concurrently.

Count Thirty-nine charges Abbrescia, Doran and Grieco caused a falsely altered check of victim Bynum to be transported in interstate commerce with fraudulent intent, knowing it to have been falsely altered.

Bynum testified that he signed a check on the First National Bank of Hudson, Ohio for $25.00 and that it had been raised to $125.00. There was some contrariety in this witness's testimony with respect to the details of what transpired the night the check was signed. This is understandable in light of the testimony of the scheme. We think, however, there is sufficient evidence, including the check itself, to show that the check was falsely altered.

There is evidence from which the jury could reasonably infer that Doran printed the Bynum check, Exhibit 39. It bears the endorsements "Dominick Abbrescia" and "J.

Grieco 20284." It also bears the endorsements of the Merchants National Bank and Federal Reserve Bank of Chicago. There is evidence of fingerprints and comparisons of handwriting from which the jury could reasonably infer that Abbrescia wrote his endorsement, and from comparison of handwriting that Grieco wrote his. There is evidence from which the jury could reasonably infer that Abbrescia, Doran and Grieco caused the check to be transported from Chicago, Illinois to Hudson, Ohio.

This substantial evidence supports their convictions on Count Thirty-nine. We need not, therefore, consider Count Forty, since the sentences are concurrent. *Lawn v. United States*, 355 U.S. 339, 359 (1958); *Boviaro v. United States*, 353 U.S. 53, 59 n. 6 (1956); *United States v. Sheridan*, 329 U.S. 379, 381 (1946).

This evidence does not include statements of Grieco's co-conspirators and his conviction does not offend the rules in *Krulewitch v. United States*, 336 U.S. 440 (1959). He was charged as a principal in Count Thirty-nine. The jury could reasonably have inferred that Grieco, when he endorsed the Byrum check, knew it was falsely altered, would be put in the mail and be forwarded by Merchants National Bank in interstate commerce to the drawee bank. These would be sufficient to support the finding that he "caused" the mailing. *United States v. Sheridan*, 329 U.S. 379, 391 (1946), citing *Kann v. United States*, 323 U.S. 88, 93 (1944), and was a principal in the unlawful enterprise.

No error was committed in the giving of instructions. The facts here are different from those in *Pinkerton v. United States*, 328 U.S. 640 (1946) and the instruction there is inapplicable here. Grieco was indicted in Count

Thirty-nine as principal. And although the trial court here omitted the word "altered" at one place in reading the definition of the offense in Count Thirty-nine, other instructions explained the offense and prevented error.

We find no merit in the contention that Abbrescia and Doran were denied a fair trial. The testimony that Doran was arrested in a brothel was neutralized by the abundance of kindred testimony. There was evidence seized in the brothel, and no showing that it was not seized in a search incidental to a lawful arrest. We see no error in its admission.

There is no ground for complaint about notations on Exhibit 961b.[4] Defendants stipulated with respect to it and had an opportunity to inspect it with other exhibits, and no objection was made to its going to the jury.

We have discussed the points that need consideration. No prejudicial error is shown. There is substantial evidence to support the verdicts of guilty on conspiracy Counts One, Two, Six, and substantive Count Thirty-nine.

For the reasons given, the judgment is AFFIRMED.

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[4] Exhibits 961a and 961b are photographs of the reverse sides, stapled together, of a standard FBI fingerprint form. Notations on 961b included "Charge or Offense • • • ITSP & Mail Fraud," "Send Copy U. S. Probation Office," and "Wanted by Bureau." 961a was offered to prove Abbrescia's handling of fraudulent checks. 961b was not offered.

APPENDIX B.

In the

United States Court of Appeals

For the Seventh Circuit

Chicago 10, Illinois

Thursday, January 11, 1962

BEFORE

HON. ELMER J. SCHNACKENBERG, *Circuit Judge*
HON. WIN G. KNOCH, *Circuit Judge*
HON. ROBERT J. KILEY, *Circuit Judge*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
DAVID DORAN, DOMINICK ABBRESCIA, JULIUS GRIECO, and JOSEPH A. LoCELSO,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 13094 SEPTEMBER TERM, 1961 JANUARY SESSION, 1962

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, in accordance with the opinion of this Court filed this day.

APPENDIX C.

In the

United States Court of Appeals

For the Seventh Circuit

Chicago 10, Illinois

Monday, March 7, 1962

BEFORE

HON. ELMER J. SCHNACKENBERG, *Circuit Judge*
HON. WIN G. KNOCH, *Circuit Judge*
HON. ROBERT J. KILEY, *Circuit Judge*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
DAVID DORAN, DOMINICK ABBRESCIA, JULIUS GRIECO, and JOSEPH A. LoCELSO,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 13094 SEPTEMBER TERM, 1961 MARCH SESSION, 1962

It is ordered by the Court that the Petition for a rehearing in this cause be, and the same is hereby, DENIED.

APPENDIX D.

Constitutional provisions and statutes involved. Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part:

> " . . . no state shall . . . deprive any person of life, liberty, or property without due process of law; . . . "

Section 1314, Title 18, United States Code, provides in pertinent part:

> "Whoever, having devised . . . any scheme . . . to defraud . . . for the purpose of executing such scheme . . . places in any Post Office or any depository for mail, any matter or thing whatever to be sent or delivered by the Post Office Department . . . or knowingly causes to be delivered by mail according to the direction thereon . . . any such matter or thing, shall be fined not more than $1,000.00 or imprisoned not more than 5 years, or both."

Section 2314, Title 18, United States Code provides in pertinent part as follows:

> "Whoever transports in interstate . . . commerce any . . . securities . . . of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; or
>
> "Whoever, with unlawful or fraudulent intent, transports in interstate . . . commerce any falsely made, forged, altered, or counterfeited securities, knowing the same to have been falsely made, forged, altered, or counterfeited . . . .
>
> "Shall be fined not more than $10,000.00 or imprisoned not more than 10 years or both."